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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Plaintiff Brink's Network, Incorporated
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED

Opposer

v.

THE BRINKMANN CORPORATION

Applicant

Opposition No. 91164764

REPLY MEMORANDUM IN SUPPORT OF OPPOSER'S
MOTION FOR RESUMPTION OF PROCEEDINGS AND
RECONSIDERATION OF APRIL 2, 2007 ORDER TO THE
EXTENT IT PRECLUDES OPPOSER FROM OBJECTING TO
APPLICANT'S AMENDED FIRST SET OF INTERROGATORIES

I. INTRODUCTION

In accordance with § 502.02(b) of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") and Rule 2.127(a) of the Trademark Rules of Practice, Opposer respectfully requests the Board exercise its discretion in favor of considering the following brief submission distinguishing the primary authority cited in Applicant's memorandum in opposition to the motion now before the Board. As the decision relied on by Applicant was not addressed in Opposer's moving papers, the points covered in this Reply Memorandum are clearly appropriate and useful to the Board.

II. ARGUMENT

Applicant's reliance on the decision in *No Fear, Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000), is fundamentally misplaced. Contrary to the assertion at p. 7 of Applicant's opposing memorandum, that decision does not stand for the categorical proposition that when a motion to compel is granted the responding party automatically forfeits its right to object on the merits to discovery requests. Rather, as the *No Fear* decision makes abundantly clear, "[a] party which fails to respond to a request for discovery during the time allowed therefore, and which is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding party, to have forfeited its right to object to the discovery request on its merits." 54 USPQ2d at 1554. (emphasis added; citing TBMP § 403.03 – "Time for Service of Discovery Responses").

Under this standard, the sole predicate for a finding that Opposer forfeited its right to object on the merits – a failure to respond to interrogatories – is completely absent. Specifically, Opposer timely filed its response to Applicant's interrogatories in the form of a general objection in accordance with, and indeed as mandated by, Rule 2.120(d)(1)¹ and TBMP § 405.03(e).²

¹ Rule 2.120(d)(1) of the Trademark Rules of Practice provides that "[i]f a party upon which interrogatories have been served believes that the number of interrogatories exceeds the limitation specified in this paragraph, and is not willing to waive this basis for objection, the party shall, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number."

² Section 405.03(e) provides that "[i]f a party on which interrogatories have been served, in a proceeding before the Board, believes that the number of interrogatories served exceeds the limit specified in 37 CFR § 2.120(d)(1), and wishes to object to the interrogatories on this basis, the party must, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number. A party should not answer what it considers to be the first seventy-five interrogatories and object to the rest as excessive." Even assuming, *arguendo*, Opposer's General Objection did not constitute a timely response to

It should be noted that Applicant's motion to compel does not assert – and Applicant does not now maintain – that Opposer “fail[ed] to respond to a request for discovery during the time allowed therefore,” as is required by TBMP § 403.03. Therefore, under the only case Applicant relied on in its opposing memorandum, as well as the pertinent rules governing this case, Opposer clearly did not forfeit its right to object on the merits to Applicant's Amended First Set of Interrogatories.

The only relevant point made in the *No Fear* decision is that the Board “is invested with great discretion in determining whether such forfeiture [of the right to object] should be found.” 54 USPQ2d at 1554. The Board should exercise its discretion in this instance by modifying its earlier Order of April 2, 2007, which precludes Opposer from objecting to any of Applicant's First Set of Interrogatories. If the Board were to conclude otherwise, any party which believes that an adversary's interrogatories exceed the limit will be forced to serve both a general objection and specific objections to preserve its right to object on the merits. Such a requirement is contrary to sound practice.

Opposer notes that a Protective Order governing the exchange of confidential information is now in place. Accordingly, if the present motion is granted, Opposer will not interpose any objection to Applicant's Amended First Set of Interrogatories on the ground that such interrogatories seek confidential information.


III. CONCLUSION

Based on the foregoing and the arguments previously presented, Opposer should be entitled to interpose appropriate objections to specific interrogatories included in Applicant's Amended First Set of Interrogatories.

Applicant's discovery requests, that General Objection, which was served in accordance with Board rules and procedure, would clearly constitute “excusable neglect” under the standard articulated by the Board in the *No Fear* case.

BRINK'S NETWORK, INCORPORATED

Dated: November 28, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Memorandum in Support of Opposer's Motion for Resumption of the Proceedings and Reconsideration of the April 2, 2007 Order to the Extent it Precludes Opposer from Objecting to Applicant's Amended First Set of Interrogatories was served on the following counsel of record for Applicant by U.S. Mail, first class mail postage prepaid, this 28th day of November, 2007:

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